Center for Immigration Studies

Backgrounder

September 2002

The Deportation Abyss

"It Ain't Over 'Til the Alien Wins"

By Michelle Malkin

Credibility in immigration policy, as the late Texas congresswoman Barbara Jordan remarked, rests on three simple principles: "People who should get in, get in; people who should not enter are kept out; and people who are deportable should be required to leave."[1]

After September 11, the speedy detention of some 1,200 aliens suspected of terrorist ties gave the illusion of competence in this last crucial area of immigration enforcement. Although civil-liberties advocates and Arab-American activists immediately attacked the swift ruthlessness of INS and the Justice Department,[2] the obstacles to actually getting rid of unwanted guests are myriad. The system is clogged by conflicting statutes, incomprehensible administrative regulations, bureaucratic and judicial fiefdoms, selective enforcement, and a feeding frenzy of obstructionist immigration lawyers.

It is a climate which continues to favor aliens' rights over citizens' safety.

Cons and Absconders

Government watchdogs have found the INS to be habitually lax in its efforts to track down and help boot out the worst criminal offenders among the alien population. A number of federal laws require the agency to initiate deportation actions against aliens convicted of aggravated felonies as quickly as possible and before they are released from federal or state prisons.[3] Congress increased funding and staffing for a Justice Department program to speed up this process. Yet, thousands of criminal aliens have been released into the public after serving their sentences because of the INS's failure to screen and send them into deportation hearings. This failure both endangers the public and is costly. If INS had completed proceedings for all deportable criminal aliens released from federal and state prisons in 1995 before their release, it could have avoided nearly $63 million in detention costs.[4]

Meanwhile, untold hundreds of thousands of "absconders" are roaming the country — illegal alien fugitives who have been ordered deported by immigration judges but who continue to evade the law. In December 2001, INS Commissioner James Ziglar revealed for the first time under oath that the INS did not know the whereabouts of "about 314,000" fugitive deportees. Only then did Justice Department officials move, for the first time ever, to place their names in the FBI's National Crime Information Center database.[5]

The absconder statistics remain in dispute after the agency conceded to reporters from Washington, D.C.-based Human Events newspaper that it could not vouch for the accuracy of the number. Some, including Representative George Gekas, a Pennsylvania Republican who chairs the House immigration subcommittee, believe the actual number could run as high as one million.[6] This much remains indisputable: All of these fugitives have been ordered out of the country by an immigration judge. They were either deported in absentia or sentenced in a courtroom and then released on their own recognizance pending final deportation, only to disappear back into the woodwork.

In January 2002, the Justice Department unveiled the "Absconder Apprehension Initiative." The government said it would finally begin ejecting fugitive deportees, beginning with about 1,000 immigrants from Middle Eastern countries who had been convicted of felonies in the United States. But after announcing the new campaign to round up these alien evaders, the INS admitted it would take at least a

Michelle Malkin is a nationally syndicated columnist and a Fox News Channel commentator. *This* Backgrounder *is adapted from her new book,* Invasion: How America Still Welcomes Terrorists, Criminals, and Other Foreign Menaces to Our Shores *(Regnery, 2002).*

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The [Board of Immigration Appeals] receives more than 30,000 appeals every year, and has a backlog of 56,000 cases, of which 34,000 are more than one year old, 10,000 are more than three years old, and some are even more than seven years old.

year to enter all their names in the FBI criminal database — and that the new system would probably enable the INS to locate just 10 percent of the missing deportees.[7]

Staff shortages also hamper the ambitious absconder apprehension effort. In May 2002, several agents and supervisors told *The New York Times* that the INS office in New York could barely handle the added function. The employees noted "that only 14 federal immigration agents and nine police investigators are assigned to find and deport roughly 1,200 illegal immigrants who came from countries where Al Qaeda has been active…After three months, fewer than 150 have been arrested."[8] By the end of May 2002, the Justice Department admitted that only 585 absconders out of 314,000 had been located. Not a single terrorist has been caught.[9]

In the meantime, the INS continues to entrust tens of thousands of ordered deportees to leave on an honor system, sending them notices asking them to turn themselves in. Laughed at around the world, the INS notices are known as "run letters" among illegal aliens.[10]

Even if the INS tracked down every last one of the absconders, there would be no place to detain them. Detention space has been sorely misallocated and misused. Nearly $30 million earmarked for building new state-of-the-art detention facilities in San Francisco, for example, was diverted to speed up processing of citizenship applications.[11] Currently, the agency has only about 20,000 beds, at a time when as many as 200,000 aliens are ordered deported each year.[12]

Into the Legal Abyss

While the INS receives much-deserved flack for the deportation quagmire, a large portion of the blame lies with the independent agency in charge of the nation's immigration courts, the Executive Office for Immigration Review (EOIR), and its appellate body, the Board of Immigration Appeals (BIA), which thrive on making the deportation process as time-consuming and unwieldy as possible. Together, these two independent agencies — separate from the INS, but also housed under the Justice Department — hold the ultimate keys to deportation. While the INS has responsibility for apprehending and bringing immigration charges against aliens, it is the little-known EOIR that has jurisdiction over the nationwide Immigration Courts and their companion appeals system. More than 200 immigration judges preside in 52 courts across the country. They oversee removal proceedings, as well as bond re-determination hearings, in which the judges can reduce the bond imposed by the INS for aliens in custody who seek release on their own recognizance before final deportation.[13]

The BIA's 20-odd members, based in Falls Church, Va., are politically-appointed bureaucrats who have the power to overturn deportation orders nationwide. The panel — comprised largely of alien-friendly advocates from immigration-law circles — receives more than 30,000 appeals every year, and has a backlog of 56,000 cases, of which 34,000 are more than one year old, 10,000 are more than three years old, and some are more than seven years old.[14] There's even a saying among immigration insiders in Washington about the deportation process: "It ain't over 'til the alien wins."

One Justice Department employee who runs an independent web site on the deportation morass observes:

> *Between the incompetence of the INS, the complete lack of alien detention center space, and the bureaucracy of the EOIR, our system for deporting known illegal aliens and criminal alien residents is a sad joke. But no one is laughing. If all of the illegal aliens and deportable resident alien criminals were rounded up tomorrow, the system would not be capable of handling them. It would be an absolute disaster. The INS and the EOIR wouldn't have the foggiest idea of what to do with them! The aliens would all be released back out on the street on immigration bonds and go back right where they were as if nothing happened, while their cases would grind on through the system of Immigration Court hearings and endless appeals.*[15]

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EOIR director Kevin Rooney summarized the plethora of appeal options available to all aliens — even criminal aliens — in his February 2002 testimony to Congress: "Even if an alien is removable, he or she may file an application for relief from removal, such as asylum, voluntary departure, suspension of deportation, cancellation of removal, adjustment of status, registry or a waiver of inadmissibility."[16] What does all this bureaucratic jargon spell? Delay, delay, delay. Each of the loopholes enumerated by Rooney is written into the Immigration and Nationality Act. If an alien loses a BIA judgment, he can then seek relief in the federal circuit courts of appeal.

While most Americans are unaware of these dirty little secrets, the legal tricks for evading the flimsy immigration dragnet are well known among the immigrant population. An internet search of the phrase "how to avoid deportation" yields thousands of hits, including this one from a web site called GotTrouble.com (which "delivers real world solutions to people facing serious legal and financial trouble"):

Relief from deportation

There may be a way to avoid deportation, even if a person has a criminal record.

The law provides relief for:
1) long term permanent residents who have not been convicted of certain serious felonies;

2) persons who have been in the United States for a long period of time and can show that being forced to leave would cause serious hardship to their family members who are United States citizens or permanent residents;

3) persons who [claim they] would be subject to torture or other physical harm if they were returned to certain countries;

4) persons who [claim they] would be subject to persecution on account of political opinion, race, national origin, or membership in a particular social group; or

5) in some limited situations, persons who are married to United States citizens or can qualify for permanent resident status.

The special circumstances that might allow a person to avoid removal are highly technical. An experienced immigration attorney should be consulted.[17]

The web site provides a helpful directory of immigration lawyers in all 50 states to assist the troubled alien in need of "relief." These loopholes have been exploited by countless convicted aliens jailed for crimes ranging from drunk driving to baby-killing.

Here's just a small sample of the criminal aliens let off the deportation hook:

• Citing "severe emotional hardship" to her family and American-born children, a three-member panel of the board halted the deportation of Haitian nanny Melanie Beaucejour Jean. She had been convicted in upstate New York of killing an 18-month-old baby in her care. "I hit him two or three times with my fist on the top of his head. I did this to stop him from crying. It did not work," she told Monroe County, New York, investigators. "I do not know how long I shook the baby, but I did not stop until he was unconscious," her police statement said. At the request of the INS, immigration judge Phillip J. Montante Jr. ordered her deported back to her native land more than two years ago. But thanks to a trio of pro-alien, Janet Reno-installed bureaucrats, Beaucejour Jean continued to enjoy life in America.[19]

Cecilia Espenoza, Lory D. Rosenberg, and Gustavo Villageliu — all appointed to the Board of Immigration Appeals by Clinton Attorney General Janet Reno — concluded that Jean's crime "does not constitute a crime of violence" and is not an aggravated felony subject to deportation guidelines. Legal analyst Beverley Lumpkin noted in her ABC News online column that Espenoza and Rosenberg are known as "reflexive advocates for aliens who just don't care about the facts of a case." Espenoza's left-wing roots are so deeply ingrained that she named her son after Marxist guerilla Che Guevara.[20]

In May 2002, Attorney General John Ashcroft announced a rare reversal of the immigration board's decision. "Aliens arriving at our shores must understand that residency in the United States is a privilege, not a right," Ashcroft wrote. "For those aliens ... who engage in violent criminal acts during their stay here, this country will not offer its embrace."[21] Tough words. But they're not invoked frequently enough.

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• Min Song was a Korean national convicted of theft as an 18-year-old in 1992. He was sentenced to a year in prison for the aggravated felony, which was a deportable crime. To avoid removal from the country, however, Song persuaded a judge to trim the sentence from a year to 360 days. At less than a year, the suspended sentence was no longer grounds for automatic deportation. The immigration appeals board accepted the sleight of hand and allowed Song to stay in the country.[22] The decision paves the way for convicted aggravated felons of all kinds to pressure sympathetic judges to modify their sentences and avoid deportation.

"It's a great pro-alien, pro-immigrant decision because there's been a lot of setbacks for criminal aliens," crowed John T. Riely, Song's lawyer.

• Fernando Alfonso Torres-Varela, a Mexican national, was convicted of drunk driving three times. He knowingly drove while intoxicated and knew that he was driving with a suspended or revoked license. The INS sought to deport him for committing a crime of moral turpitude. He appealed to the BIA. Despite holding in the past that a crime of moral turpitude involved conduct "that is contrary to the accepted rules of morality and the duties owed between persons or to society in general," the board concluded that Torres-Varela's serial drunk driving did not qualify as such a crime. INS's request to deport Torres-Varela was denied.

• Stephanie Short, a German national, was convicted of encouraging her 3-year-old daughter to submit to sexual assault at the hands of her stepfather. He was convicted of sexual offenses; she was convicted of aiding and abetting the assault of a minor with the intent to commit a felony. She served three years of an eight-year sentence and was released on parole. The INS sought Short's deportation based on her conviction for a crime of moral turpitude (in other words, a crime that is inherently base, vile, or depraved). An immigration judge supported the move. Short appealed to the BIA. In a mind-boggling decision, the board determined that it "was inappropriate to consider the husband's conviction record for purposes of determining the underlying crime of which the respondent was convicted of aiding and abetting."[25]

In other words: It was wrong for the judge to consider the fact that Short's husband raped her daughter with her approval. "As the Board no longer holds that an assault with intent to commit any felony necessarily constitutes a crime involving moral turpitude without regard to the nature of the underlying felony," the convoluted decision stated, "the (Immigration) Service has not established that the respondent was in fact convicted of a crime involving moral turpitude where it failed to establish the underlying felony that was intended."[26]

In an outraged column blasting the ruling, the late Chicago Tribune columnist Mike Royko wrote: "We actually pay taxes for that kind of gibberish. Here we have a woman who, at one point in the original FBI investigation, confessed to a crime of moral turpitude.

She was found guilty of aiding and abetting a crime of moral turpitude. She spent three years in prison for joining in on the moral turpitude. My guess is that even creeps like John Gacy, Richard Speck and Jack the Ripper would agree it was a crime of moral turpitude."[27]

For the word-twisters and definition-stretchers at the BIA, such "gibberish" upholding the rights of baby-killers, burglars, habitual drunk drivers, and accessories to child rape is par for the course. Attorney General Ashcroft shouldn't be forced to spend his time undoing this superfluous board's idiotic—and treacherous—rulings one by one. The board should be abolished. The last thing we need as we wage our war on terrorism are entrenched, unelected sympathizers in the courts who put alien rights over American lives.

Catch and Release

The most dangerous loophole exploited by aliens seeking relief from the EOIR and BIA is the voluntary departure option. Intended as a cost-saving measure to streamline the deportation process, voluntary departure allows aliens to enter into an agreement to leave the United States on their own volition and to avoid the consequences of a formal order of removal (such as being barred from re-entering the country for 10 years). This frees the alien to leave and attempt to re-enter legally, leave and enter illegally, or violate the agreement and continue to stay here illegally. Guess which option most aliens are likely to choose?

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act passed some new restrictions on the policy, including stricter time limits, increased civil penalties, and added eligibility criteria. Aggravated felons and terrorists are not supposed to be eligible, but in 1999, the Justice Department's Inspec-

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tor General warned: "INS does not know which illegal aliens granted voluntary departure by immigration judges have left the United States because the process for verifying departures is flawed." There is no tracking system. "Immigration judges and INS trial attorneys are not required to provide information or instructions to aliens about how to verify their departure, nor did we witness them do so in our courtroom observations. In most cases, INS has no further contact with the alien after the immigration judge issues the voluntary departure order."[28] Therein lies the recipe for absconders run amok.

The Inspector General's report also noted that immigration judges "inappropriately grant voluntary departure to some aggravated felons" because both the courts and the INS fail to conduct adequate criminal history checks on illegal aliens before letting them go.[29] In response to persistent charges that criminal checks were not being done on aliens placed in removal proceedings even after September 11, INS Executive Associate Commissioner for the Field Operations Office Michael Pearson issued a memo on December 20, 2001, to "clarify" that such checks should be done prior to release from INS custody.[30] How reassuring.

This "catch and release" process continues to frustrate INS agents on the front lines. Senior Border Patrol agent Mark Hall, whose union represents officers who patrol the United States-Canadian border in Michigan and Ohio, told Congress in November 2001: "When illegal aliens are released, we send a disturbing message. The aliens quickly pass on the word about how easy it is to enter this country illegally and remain here. This practice is devastating to our sound border enforcement strategy."[31]

What to Do?

The highest-priced, most sophisticated home security system will be ineffective if police don't come and take away the thieves who manage to break in. The same holds true for homeland security. Tight locks and screen doors are important, but the United States must also develop an effective system of detention and deportation to rid our collective home of uninvited guests — and keep them out.

Illegal aliens who have been ordered deported must not be allowed to run free. The voluntary departure option is an escape hatch that must be eliminated. This policy benefits no one but the aliens who eagerly volunteer to abuse our deportation system's undeserved trust. Congress should amend the Immigration and Nationality Act to eliminate voluntary departure as an option during removal proceedings before an immigration judge.

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Moreover, federal law mandates that criminal aliens who re-enter the United States after deportation face up to 20 years in jail. Yet, the law is applied only sporadically by United States Attorney's Offices.

Increased enforcement, of course, cannot succeed without greatly expanding the INS's current 20,000-bed detention capacity. Even when deportation absconders are tracked down, they are often let go because there's nowhere to put them. One official of a bonding company said the INS was freeing 50 percent of the aliens he had been ordered to track down and turn in since September 11.[32] California Representative Elton Gallegly's proposal from 1995 to convert closed military bases to illegal alien detention facilities should be dusted off and put into action immediately.

Finally, Attorney General John Ashcroft should abolish the Executive Office for Immigration Review and the Board of Immigration Appeals and transfer their functions to existing law enforcement officers within the immigration bureaucracy. The alien lawyer lobby claims that any streamlining of the deportation bureaucracy poses a "threat to the integrity of the immigration process."[33] Nonsense. Restoring integrity to the immigration process will require closing the loopholes and black holes into which so many fugitive absconders, criminal aliens, and unwelcome guests have disappeared.

"Due process" for illegal aliens has for too long resulted in too many endless delays — and too many interminable stays.

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End Notes

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